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19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**  
21 **WESTERN DIVISION**

22 OX LABS, INC.,

23 *Plaintiff,*

24 vs.

25 BITPAY, INC. and Does 1-10,

26 *Defendants.*

Case No. 2:18-cv-05934-MWF-KS

**DEFENDANT BITPAY, INC.'S  
OPPOSITION TO  
PLAINTIFF'S MOTION IN  
LIMINE NO. 1 TO  
PRECLUDE EVIDENCE OF  
PARTIES' SETTLEMENT  
COMMUNICATIONS**

Pretrial Conf: November 18, 2019  
Time: 11:00 A.M.  
Dept.: 5A  
Trial: December 3, 2019

**MEMORANDUM OF POINTS AND AUTHORITIES:**

**I. INTRODUCTION**

In general, BitPay does not oppose the exclusion of evidence of proposals for settlement as required by FRE 408. Plaintiff Ox Labs' Motion in Limine No. 1, however, is premature and overbroad, as it seeks to exclude all factual communications because they happen to contain proposals for settlement.

**II. ARGUMENT**

**A. Ox Labs Impermissibly Points To Communications Generally Without Citing The Specific Language At Issue.**

Ox Labs' Motion in Limine No. 1 should be denied outright for failing to specifically identify the evidence it seeks to exclude. As stated in *Mims v. Fed. Express Corp.*, No. CV 13-03947-AB (SSX), 2015 WL 12711651, at \*1 (C.D. Cal. Jan. 15, 2015):

Motions in limine afford the court and counsel the opportunity to give more deliberate consideration to specific objections to specific evidence. *Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525-PSG (PJWx), 2010 WL 2035800, at \*1 (C.D. Cal. May 19, 2010). They will not lie to exclude broad categories of evidence. *See Liberal v. Estrada*, No. C 07-0024 SBA, 2011 WL 3956068, at \*5. As one California court has succinctly observed, unless the motion identifies specific evidence it seeks to exclude and the specific reasons to exclude it, the court would be forced to "rule in a vacuum" on the admissibility of evidence. *Kelly v. New West Federal Savings*, 49 Cal.App.4th 659, 670, 56 Cal.Rptr.2d 803 (Cal. Ct. App. 1996). If granted, such amorphous motions would "leav[e] the court and the parties to guess what [evidence] during trial may be included within the scope of the ruling." *Id.*

*See also Vago v. Cty. of Los Angeles*, No. CV 13-868 DMG (RZX), 2015 WL 13697386, at \*4 (C.D. Cal. Aug. 7, 2015):

Motions in limine should refer to specific evidence. (See Scheduling and Case Management Order at 7 ("Motions in limine should address specific issues (i.e., not "to

1 exclude all hearsay, etc.).”) [Doc. # 22].) The Court declines to  
 2 consider blanket objections. Counsel may  
 3 raise specific objections at trial.

#### 4 **B. Review Of The Specific Evidence Sought To Be Excluded**

5 In broad-brush terms, Ox Labs seeks to exclude evidence of the following:

6 1. Letters between May and July 2017 between Larry Kunin, trial counsel  
 7 for BitPay, and David Gutierrez, General Counsel for Ox Labs. Since it appears the  
 8 parties are stipulating to the fact that Mr. Gutierrez made a demand, and that Mr.  
 9 Kunin rejected the demand, BitPay agrees to exclude these letters from evidence.

10 2. A set of emails between the principals of the parties between February  
 11 2017 and May 2017 (before lawyers were involved), including an attachment to  
 12 those emails from Ox Labs to BitPay, contain pre-trial settlement offers, discussions,  
 13 and rejections. Complete exclusion of these emails is improper as they do not relate  
 14 to settlement discussions, but instead relate to the factual investigation of the issue  
 15 in this lawsuit. To the extent any language is seemed a proposal for compromise,  
 16 that can be redacted at trial. To completely exclude this probative evidence at this  
 17 stage is improper and not required by FRE 408. Indeed, it is this exchange of emails  
 18 that discloses that it was BitPay that discovered the error, initiated the investigation  
 19 with Ox Labs, and Ox Labs’ response to its end of the investigation. These  
 20 communications are absolutely “business communications” of investigation of the  
 21 issue.

22 As stated by Ox Labs, the Ninth Circuit requires that settlement discussions  
 23 must first have crystallized before Rule 408 will apply to bar admission of evidence.  
 24 *Josephs v. Pac. Bell*, 443 F.3d 1050, 1064 (9th Cir. 2006) (“Because the purpose of  
 25 Rule 408 is to encourage the compromise and settlement of existing disputes,”  
 26 evidence of a grievance proceeding could be admitted because it did not concern  
 27 Plaintiff’s not-yet-filed discrimination claim). The emails and attachments between  
 28 the parties relate to the underlying issue and its investigation, they were not  
 crystallized into settlement discussions.

1           3.     June 6, 2017 letter from L. Kunin to D. Gutierrez (“This law firm  
2 represents Bitpay ... the demand by Ox Labs represents an attempt to obtain a  
3 windfall.... By our calculations, the value of the Bitcoins on July 11, 2015 was  
4 approximately \$56,000. BitPay will deliver such funds upon full satisfaction of the  
5 error ....”). This too is not a settlement communication – no compromise was offered  
6 – it was BitPay’s calculation of the error.

8           4.     July 12, 2017 letter from L. Kunin to D. Gutierrez (“I have discussed  
9 Ox Labs’ settlement options with BitPay. BitPay remains unwilling to pay ....”). Ox  
10 Labs also refers to this Court’s language in its summary judgment order that this  
11 letter was an “offer of settlement.” Order at 4 (Dkt. 36). This is simply not true on  
12 the face of the letter – it was an unconditional tender of payment. The letter outright  
13 rejects settlement with no counter but instead makes an unconditional tender of  
14 payment – no settlement, no release. To the extent the Court determines liability,  
15 this letter is evidence of alleged damages already paid, which affects liability in the  
16 first place as well as any right to interest.  
17  
18  
19

20                               Respectfully submitted,

21           DATED: November 4, 2019

22                               RUSS, AUGUST & KABAT  
23                               Benjamin T. Wang  
24                               James S. Tsuei

25                               By: /s/ Benjamin T. Wang

26                               Attorney for Defendant  
27                               BitPay, Inc.  
28

**CERTIFICATE OF SERVICE**

I hereby certify pursuant to the Federal Rules of Civil Procedure and LR 5-3 and 5-4 that the foregoing **DEFENDANT BITPAY, INC.’S OPPOSITION TO PLAINTIFF’S MOTION *IN LIMINE* NO. 1 TO PRECLUDE EVIDENCE OF PARTIES’ SETTLEMENT COMMUNICATIONS** was served upon the attorney(s) of record for each party through the ECF system as identified on the Notice of Electronic Filing on November 4, 2019.

By: /s/ Benjamin T. Wang  
Benjamin T. Wang

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